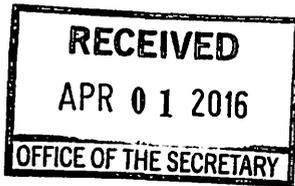


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UNITED STATES OF AMERICA

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Before the

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SECURITIES AND EXCHANGE COMMISSION

Office of Administrative  
Law Judges

Washington, DC 20549

MARCH 31, 2016

ADMINISTRATIVE PROCEEDING

File No. 3-15764

In the Matter of

GARY L. MCDUFF,  
Respondent

**MEMORANDUM IN SUPPORT  
OF MOTION FOR PRE-TRIAL  
HEARING SCOPE DECISION**

**STATEMENT OF FACTS**

The Commission vacated this Court's 9/5/14 initial decision granting summary disposition (Rel. # 74803/4-23-15, pg. 7) holding this Court erred in relying on the underlying default judgment in finding the undersigned acted as a broker dealer (*id.*, pgs. 2, 3 & 4).<sup>1</sup> In doing so it first generally "remand[ed] this matter to the law judge for further proceedings[]" (*id.*, pg. 1). Then, in discussing this Court's error on the broker-dealer issue it specifically "remand[ed for this Court] to admit and consider [as to the summary disposition proceedings] additional evidence [] to determine whether McDuff was acting as a broker or dealer at the time of his misconduct[]" (*id.*, at pg. 5) without specifying whether further evidence would be for continuing summary disposition proceedings or for the otherwise required public hearing. But it clearly vacated this Court's 9/5/14 decision. *Id.*, pg. 7.

<sup>1</sup> It also held this Court erred in imposing the collateral bar relying on the allegations of the civil complaint and superseding indictment. *Id.*, pgs 5 & 6.

This Court concluded that "[o]n remand the Commission directed [it] to FIRST determine whether McDuff was acting as a broker, and if that criteria were met, to determine whether the sanction sought was in the public interest[]" (Rel. # 3-15764 /10-2-15 pgs. 2 & 8) (emphasis).<sup>2</sup> The Court now opines without so ruling "that the hearing [in this matter] should be limited temporally by limiting its scope to whether [the undersigned] was acting as a broker or dealer at the time of [the] misconduct[]" (Rel. # 3654/2-29-16).<sup>3</sup>

## ARGUMENT

### I

#### **MERITS-SUMMARY-DISPOSITION VACATED THIS COURT'S INITIAL DECISION AND PROCEEDINGS AFTER IT HAVE NO EFFECT**

Pursuant to 17 C. F. R. § 201.411(a) the Commission vacated this Court's grant of summary disposition holding, contrary to this Court's finding, that there are genuine issues of material facts to justify summary disposition. That was its sole review issue. *Id.*, 201.411(d). Accordingly, the "majority of [the] participating Commissioners [having] not agree[d] to [such] disposition on the merits, the initial decision [and necessarily all following proceedings] shall be of no effect[]" (*id.*, 201.411(f)).

Summary disposition having been ordered vacated, this Court may have erred in sua sponte re-instituting summary disposition proceedings but despite it, this Court ultimately denied summary disposition to both sides ordering a hearing. Twice, therefore, disposition on the merits through summary disposition proceedings have rendered all previous factual findings, if any, null and void.

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<sup>2</sup> But the broker-dealer issue must necessarily be first determined regardless of the Commission's implied direction for it because a finding of it is a prerequisite to sanctions imposition. *Id.*, pg. 1, n.2.

<sup>3</sup> The Division is apparently convinced that this Court will indeed limit the hearing to the broker-dealer issue and thus proposes the hearing be held at the undersigned's custody institution through videoconferencing (Division's 3/24/16 Status Report) to which the undersigned objects as unfair and in violation of the public hearing requirement.

While the Court "intend[s] to give both parties an opportunity to be heard on that subject before the hearing commences[]" (*id.*), implying it will do so immediately before said hearing, a ruling on it now is necessary to ensure adequate defense preparation (Respondent's dcl., in support hereof, ¶ 6).

The proceedings have therefore automatically reverted to square one at the OIP.

## II

### **A BROKER/DEALER-ISSUE-LIMITED HEARING VIOLATES THE OIP-NOTICED PUBLIC HEARING RIGHT ON THE REMAINING ISSUES**

The OIP "ORDERED that a public hearing for the purpose of taking evidence on [ALL] the questions set forth in Section III hereof shall be convened" (OIP, § IV) (emphasis original). It did not order that a public hearing would be convened to hear only the broker/dealer issue. Nor could it have done so because 17 C. F. R. § 201.200(b)(3) requires that "[T]he order instituting proceedings SHALL [c]ontain a short and plain statement of [all] the matters of fact and law to be considered and determined" and subsection (c) thereof mandates a public hearing of all said issues. Nowhere in law or otherwise is the Commission authorized to hold a public hearing only on some of the issues. Thus the public hearing right will be violated as to the non-broker/dealer issues if this Court orders such limitation.

## III

### **LIMITING THIS HEARING TO THE BROKER-DEALER ISSUE RENDERS THE REST A 16<sup>th</sup>-CENTURY-ABANDONED TRIAL BY AFFIDAVIT**

Limiting this hearing to the broker-dealer issue renders the rest of this case, which the OIP order noticed would be publicly heard on oral testimony as required by § 15(b) of the Securities Exchange Act of 1934, a 16th-century-abandoned trial by affidavit. See, *Anstein v. Porter*, 154 F.2d 464, 471 (2nd Cir. 1946) ("We do not believe that, in a case in which the decision must turn on the reliability of witnesses, the Supreme Court, by authorizing summary judgments, intended to permit a 'trial by affidavit' [] outmoded at common law in the 16th century[.]").<sup>4</sup>

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<sup>4</sup> Because Rule 17 C. F. R. § 201.250 on summary dispositions mirrors Federal Rule of Civil Procedure 56(a) on summary judgments, its discussion and analysis fully applies to these summary dispositions.

But trials by affidavit are not authorized today. On the contrary, the "'fundamental maxim' remains that on a motion for summary [disposition] the [Commission] cannot try issues of fact; it can only determine whether there are issues to be tried[]" (*Heyman v. Commerce and Industry Ins. Co.*, 524 F.2d 1317, 1320 (2nd Cir. 1975) (quoting *American Manuf. Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272, 279 (2nd Cir. 1967))). The Commission therefore did not, and could not, try the non-broker/dealer issues, nor could any other appellate tribunal (*Anstein v. Porter*, 154 F.2d at 474 ("The avowed purpose of those who sponsored [] summary judgment practice was to eliminate needles trials [but in doing so] we should not attempt to conduct a trial in this court. [] This is not, and must not be, a trial court.")). For the same reason this Court cannot, based on the evidence submitted in connection with summary disposition proceedings, bar the undersigned from submitting defense evidence on the sanctions it intends to impose (Rel. # 3454/2-29-16) if liability is established.

#### IV

### **A BROKER/DEALER-ISSUE-LIMITED HEARING IS PARTIAL SUMMARY DISPOSITION AGAINST THE COMMISSION'S VACATE ORDER**

Although the Commission did not, and could not, try or adjudicate the non-broker/dealer issues presented in the OIP, limiting the undersigned's hearing to the broker-dealer issue would mean that the Commission affirmed this Court's grant of Rule 56(d)-like partial summary disposition to everything on the OIP but the broker/dealer issue.<sup>5</sup> But the Government never noticed or requested partial summary disposition. Nor did this Court grant, or could have granted, such. It granted full summary disposition for the Division and the Commission vacated it. Still, even if this had been a partial summary disposition proceeding, which it was not, this Court's denial of the Division's general motion for summary disposition<sup>6</sup> not only foreclosed that partial summary disposition outcome, but instead extinguished all summary disposition proceedings. The hearing on the OIP must therefore be fully anew.

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<sup>5</sup> It is also inconsistent with 17 C. F. R. § 201.411(f) clarifying that when the majority of Commissioners do not agree with this Court's decision, it "shall be of no effect" (*id.*) thus extinguishing it altogether.

<sup>6</sup> Notably "A denial of summary judgment [] is not a judgment at all. It is quite simply and solely a determination that one or more issues require a trial[]" (*Senza-Gel Corp. v. Selfhart*, 803 F.2d 661, 669 (Fed. Cir. 1986)).

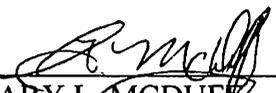
**RELIANCE ON THE SUMMARY JUDGMENT  
MOVING PAPERS RESERVING EVIDENCE  
FOR LIVE TESTIMONY IS A VESTED RIGHT**

Summary judgment "fact[s are] considered undisputed only for purposes of the [summary judgment motion; if summary judgment is denied, a party who failed to make a proper Rule 56 response or reply remains free to contest the fact in further proceedings." Rule 56, Notes of Advisory Committee on 2010 amendments. Thus "[a] nonmovant [] may feel confident that a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of detailed response to all facts stated by the movant[]" (*id.*). If so, such "position should be available without running the risk that the fact will be taken as established under subdivision (g) or otherwise found to have been accepted for other purposes[]" (*id.*).

**CONCLUSION**

The scope of the hearing should therefore not be limited to the broker/dealer issue and must be plenary instead.

Dated: March 31, 2016

  
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GARY L. MCDUFF,  
Respondent